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IN THE

SUPREME COURT OF THE

UNITED STATES.

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,
Appellants,
vs.
PETER KIEWIT SONS' CO.,
a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,
Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM OF APPELLEE PETER KIEWIT SONS' CO.

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KIEWIT'S SUBSTANTIVE ARGUMENTS ARE UNSOUND. GOVERNMENT CONTRACTORS LACK IMMUNITY

In its motion, Peter Kiewit Sons' Co. (hereafter Kiewit) does not attack the

substantiality of the federal question, but rather bottoms the principal thrust of its motion on an argument supposedly going to the merits.

Kiewit's arguments are legally unsound on the basis of this Court's decisions as well as most recent California law. In James Stewart & Co. v. Sadrakula (1940) 309 U.S. 94, 105, this Court rejected the notion that a government contractor can be immune from liability. The case so heavily relied on Kiewit, Yearsley v. W. A. Ross Construction Co. (1940) 309 U.S. 18 is consistent with the position of Appellants (hereafter referred to as Homeowners). The teaching of Yearsley is that a contractor may escape liability where " . . . the Government in such a case promises just compensation and provides a complete remedy . . ." 309 U.S. at 21-22. Yearsley speaks to the distribution of the burdens of paying just compensation 1/. Yearsley is not a device for unfairly depriving innocent people of compensation for damages suffered by them. The same is true of the California cases cited by Kiewit.

. . Yearsley, moreover, gives rise to another point which - we submit - cuts the ground out from under Kiewit's arguments. The rule of Yearsley is that the contractor can shift the burden of compensating damaged owners to the government, only where it has performed its

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1/ Compare Jurisdictional Statement, pp. 17-20.

work as "authorized and directed" by the government. See 309 U.S. at 20-21. In the case at bench the Homeowners were not permitted to try the matter on the merits. 2/ There is therefore nothing before the Court (or the Courts below) upon which to bottom a conclusion that Kiewit acted as "authorized and directed".

In other words, Kiewit seeks to twist the eminently sensible rationale of Yearsley (i.e. that either the government or the contractor must compensate persons damaged by the construction) into a transparently erroneous assertion that a government contractor need only hold up its contract like a magic amulet, and thereby at once ward off any inquiry by the courts into the merits of the controversy.

Nor can Kiewit escape liability without inquiry into the merits, under state law. The most recent California decision on point, Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128, comprehensively and thoughtfully analyzes the field of government contractors' liability, and concludes that such liability cannot be escaped by virtue of a government contract. See 247 Cal. App. 2d at 791-792, 56 Cal. Rptr. at 141-42. It is noteworthy that Smith reasons as did this Court in

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2/ The Court will recall that this is an appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend Homeowners' complaint.

Yearsley, i. e. in considering the liability of a government contractor for damage to property, the judicial inquiry is directed to distribution of the burden as between the government and the contractor (see 247 Cal. App. 2d at 792, 56 Cal. Rptr. at 142). The policy rationale of the Smith decision (based on analysis of many cases from various jurisdictions) bears repeating here:

> " ' . . . Extension of the Government's immunity to independent contractors would run counter to recent trends and expressions which emphasize the need for restricting the immunity and the rightness of affording relief to those who suffer special damage without regard to whether the activity which caused the damage was governmental or private [numerous citations]. ' " Smith, supra, 247 Cal. App. 2d at 789-90, 56 Cal. Rptr. at 140.

Lawyers' jargon aside, the rule is simply stated: the courts have opted for fairness, not for oppression of those who are least able to bear it.

KIEWIT'S ARGUMENTS RE SUPPOSEDLY ADEQUATE STATE GROUNDS FOR THE DECISION BELOW ARE WITHOUT MERIT

A reading of the opinion of the California

Court of Appeal herein, appended to the Jurisdictional Statement, will satisfy the Court that the decision was not based on any "adequate non-federal basis" of a contractor's non-liability, Kiewit's assertions notwithstanding.

Indeed, it is fair to say that this entire line of argument by Kiewit appears to be made in something less than good faith. Kiewit has heretofore taken the contrary position. Kiewit has argued below that (a) the California Court of Appeal properly decided the case - as to Kiewit - on the basis of inverse condemnation and nuisance, and (b) the determination of Kiewit's non-liability because of its status as contractor was "[u]nnecessary for consideration by the Court of Appeal . . . ." 3/

It is difficult to understand how a principle not decided by the courts below and concededly not necessary for decision, can somehow become an "adequate non-federal basis" for the decision below.

3/ Kiewit so asserted in its brief filed in the California Supreme Court: "Respondent Kiewit's Answer to Petition for Hearing", p. 4.

THIS APPEAL SHOULD NOT BE DISMISSED FOR TARDINESS OF DOCKETING, IF ANY

Appellants submit that:

(1) It is undisputed that the Notice of Appeal was timely filed and there are no jurisdictional objections to the docketing.

(2) It is at most doubtful whether the docketing is tardy.

(3) The tardiness, if any, is de minimis.

(4) The tardiness, if any, was contributed to by a failure of air express to deliver Appellants' papers to this Court as instructed.

Kiewit's arguments are bottomed on the assumption that the judgment appealed from became final on December 11, 1968. Appellants submit that it did not. Under Rule 24(a) California Rules of Court, a decision of the California Supreme Court theoretically does not become final for 30 days after it is filed. Cf. Gorman v. Washington University (1942) 316 U.S. 98, 100-101.

Appellants are aware that this Court makes its own pragmatic determination of finality in the light of real interests of all concerned. Republic National Gas Co. v. Oklahoma (1948)

334 U.S. 62, 69. It is, therefore, submitted that pragmatically speaking, the decision below was not final until December 19, 1969, when the California Court of Appeal remittitur was entered (thereby California appellate courts lost jurisdiction). Thus, computing time from December 19, 1969, the docketing is timely.

Mr. Justice Frankfurter observed in Republic National Gas, supra, that the line circumscribing finality is "faint and faltering at times" (334 U.S. at 69). Appellants should not be punished for misreading (if misread they did) so imprecise a legal directive.

The policy of this Court has been to impose more rigorous requirements of timeliness only in cases of possible prematurity of constitutional review (Republic National Gas, supra, 334 U.S. at 71), because the right to review is then preserved until finality occurs. 4/ But in cases where tardiness of docketing is asserted in an effort to deprive an appellant of adjudication on the merits altogether, the Court has invoked an enlightened rule of treating tardy docketing as not affecting review on the merits. Johnson v. Florida (1968) 391 U.S. 596; United Public Workers v. Mitchell (1947) 330 U.S. 75, 86.

4/ But note that even that policy has been liberalized in favor of review on the merits, in more recent cases; see Mercantile Nat. Bank v. Langdeau (1963) 371 U.S. 555, 557-58.

In the case at bench particularly, the tardiness, if any, is minimal. Under Kiewit's time computation, the appeal should have been docketed on March 11, 1969. It was docketed on March 18, 1969, only seven days "late". Surely this is de minimis by any standard.

Moreover, even that modest period of time was contributed to by factors beyond Appellants' control. The documents necessary for docketing were delivered by Appellants' printers to Airborne Freight Corporation, an air express company, on March 14, 1969, with strict instructions to deliver them to the office of the Clerk of the United States Supreme Court on the next business day by special delivery service which Airborne Freight Corporation maintains to Washington, D. C. In disregard of instructions, Airborne Freight Corporation did not deliver the documents to the Clerk's office until March 18, 1969, on which date the appeal was docketed.

On these facts [5/] it is submitted that

5/ In light of the Court's language in Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co. (1966) 385 U.S. 32, Appellants respectfully suggest that they offered no comment in the Jurisdictional Statement as to supposed reasons for the tardiness of docketing of their appeal, because (a) they were (and still are) proceeding in the belief that they were not tardy, and (b) they manifestly could not anticipate that Airborne Freight Corp. would disregard instructions and fail to deliver Appellants' papers as instructed.

Kiewit's arguments relative to timeliness of docketing should be rejected.

CONCLUSION

The essence of Kiewit's motion is a desire to escape, not only liability, but even any inquiry as to whether liability exists under the facts. Appellants submit that they should be permitted to have their day in court on the merits. If Kiewit did its work as "authorized and directed" by the state, it has nothing to fear from such an inquiry. If it did not, it should compensate Appellants for the damage inflicted upon them. Basic fairness requires no less.

Kiewit's arguments, objectively read, emphasize that what Kiewit wants is to have this Court close its eyes to wholesale injustice. Kiewit's arguments are the stuff which inevitably destroys a people's faith in their system.

Appellants, therefore, pray that Kiewit's motion be denied, and probable jurisdiction noted.

Respectfully submitted,

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